

LETTER OPINION
99-L-45

May 20, 1999

Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter raising several questions about limited liability partnerships. According to information provided by your office, a law firm had previously been registered with your office as a professional limited liability partnership, or PLLP. The PLLP was subsequently terminated. The firm then registered as a limited liability partnership, or LLP, under N.D.C.C. ch. 45-22. The same four partners terminating the PLLP are listed on the LLP registration as managing partners.

You indicate that the individual partners in the LLP have now submitted articles of incorporation to individually incorporate as professional corporations, or PCs. You further indicate that when the PCs are formed, it is your belief that the LLP will amend its registration to replace the names of the individuals listed as managing partners with the names of the individual PCs created by these individuals.¹

You first ask whether your office may lawfully charter the individual professional corporations in view of the prohibition contained in N.D.C.C. § 10-31-06(1) which states that "[n]o individual may be simultaneously an executive or owner of more than one professional organization."

¹ Presumably, the law firm has terminated the PLLP and formed the LLP because under N.D.C.C. ch. 45-22, an LLP may be registered and formed by two or more persons, and persons may include "any legal or commercial entity." N.D.C.C. § 45-13-01(8). See also N.D.C.C. §§ 45-22-03 and 45-14-02(1). On the other hand, only individuals may register a PLLP. See N.D.C.C. § 10-31-02.2. An individual is defined as being a human being. N.D.C.C. § 1-01-49(3). This strategy seems questionable because any professional organization is subject to N.D.C.C. ch. 10-31 and in the event of a conflict between the provisions of N.D.C.C. chs. 45-22 and 10-31 concerning professional organizations, N.D.C.C. ch. 10-31 prevails. N.D.C.C. § 10-31-03.2. See also N.D.C.C. § 10-31-01(8) defining a professional limited liability partnership or limited liability partnership as one which, inter alia, "has as its partners only individuals"

Honorable Alvin A. Jaeger
May 20, 1999
Page 2

The term "professional organization" is defined in N.D.C.C. § 10-31-01(9) as:

- a. A professional corporation that is incorporated under this chapter;
- b. A professional limited liability company that is organized under this chapter; or
- c. A professional limited liability partnership that is registered under this chapter.

Although this definition does not explicitly include the term "limited liability partnership," the manner in which the term "professional organization" is used throughout N.D.C.C. ch. 10-31 clearly indicates that a limited liability partnership is a form of a professional organization if such organization is practicing a licensed profession. See, e.g., N.D.C.C. § 10-31-02.2(1) ("Two or more individuals may register a professional organization in the form of a limited liability partnership"); N.D.C.C. § 10-31-03.2 ("Chapter 45-22 applies to a professional organization that is created in the form of a limited liability partnership"); N.D.C.C. § 10-31-05(1)(c) (name of professional organization in the form of a limited liability partnership may contain abbreviations P.L.L.P. or PLLP or L.L.P. or LLP). In other words, a limited liability partnership which practices a licensed profession is, as a matter of law, a professional limited liability partnership under N.D.C.C. ch. 10-31.

The prohibition in N.D.C.C. § 10-31-06(1) against any individual being simultaneously an executive or owner of more than one professional organization also contains the defined terms "executive" and "owner." "Executive" is defined in N.D.C.C. § 10-31-01(2) as meaning "an officer or a director of a professional corporation . . . or a partner of a professional limited liability partnership." An "owner" is defined in N.D.C.C. § 10-31-01(5) as meaning "a shareholder of a professional corporation . . . or a partner of a limited liability partnership."

In the situation you present in your letter, your records indicate that the individual partners in the law firm in question are partners in a limited liability partnership. It is my opinion, based on a plain reading of the statute and the pertinent definitions, that if you were to charter the individual professional corporations, the prohibition in N.D.C.C. § 10-31-06(1) would be violated in that the individuals would, at least for some period of time, be both shareholders in professional corporations and partners of a limited liability partnership and thus would be simultaneously owners of more than one professional organization. See N.D.C.C. § 1-02-02.

Honorable Alvin A. Jaeger
May 20, 1999
Page 3

Even though the limited liability partnership in question was ostensibly registered under N.D.C.C. ch. 45-22, it is nonetheless subject to the requirements of both N.D.C.C. chs. 45-22 and 10-31. See N.D.C.C. § 10-31-03.2 (professional organization created in the form of a limited liability partnership enjoys the powers and privileges and is subject to the duties, restrictions, and liabilities of other limited liability partnerships except where inconsistent with the letter and purpose of chapter 10-31). See also Mary B. Bader and David J. Hauff, Registration and Operation of North Dakota and Minnesota Limited Liability Partnerships, 72 N.D. Law Rev. 556, 561 (1996). ("In North Dakota, professional firms which register as LLPs must also meet the requirements of the Professional Organizations Act [N.D.C.C. ch. 10-31].")

Consequently, since chartering the professional corporations in question would conflict with N.D.C.C. § 10-31-06(1) because the shareholders of the corporation also would be partners in a limited liability partnership, it is my opinion that you may not lawfully charter such professional corporations.

You also ask, assuming you were allowed to charter such professional corporations under the circumstances involved, whether state law would allow an LLP to amend its current LLP registration by deleting the name of the individual partners and adding the names of the professional corporations. It is unnecessary to respond to the second since it is my opinion that you may not lawfully charter the individual PCs in question. However, I note that while N.D.C.C. ch. 45-22 does permit an LLP to be formed by two or more "persons" (see N.D.C.C. §§ 45-22-03(1) and 45-14-02), N.D.C.C. ch. 10-31 only permits individuals to register a professional organization operating as a limited liability partnership. See N.D.C.C. § 10-31-02.2(1). In the event of a conflict between N.D.C.C. chs. 45-22 and 10-31, the provisions of N.D.C.C. ch. 10-31 prevail. N.D.C.C. § 10-31-03.2.²

Sincerely,

² It could be argued that the Legislature intended that LLPs could be owned and thus registered by PCs by its 1997 amendments to N.D.C.C. § 10-31-07.3 allowing professional organizations operating as LLPs to issue partnership interests to licensed "persons." See 1997 N.D. Sess. Laws ch. 103, § 95. However, neither the definition of PLLP or LLP contained in N.D.C.C. § 10-31-01(8) referring to "individuals" nor the provision allowing registration of an LLP by "individuals" as contained in N.D.C.C. § 10-31-02.2 were so amended. Thus, under current law, only individuals may register a professional organization operating as an LLP.

Honorable Alvin A. Jaeger
May 20, 1999
Page 4

Heidi Heitkamp
Attorney General

jjf/pg